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No. 1302

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In the

Supreme Court of the United States

October Term, 1970

HENRY BESSESSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit entered on October 29, 1970, affirming the judgment of the United States District Court for the District of Minnesota, finding the petitioner guilty of various violations of Title 18, United States Code, Section 1341 and Title 15, United States Code, Section 77(q)(a), and sentencing him to the custody of the Attorney General of the United States for a period of five years.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the District of Minnesota was entered on June 5, 1970, without opinion and is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court was filed October 23, 1970, No. 19,779, and is not yet reported, but is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Eight Circuit was entered on October 23, 1970 and a timely petition for rehearing was denied on December 14, 1970. On January 7, 1971, this Court entered an order extending the time for filing a petition for writ of certiorari to and including February 4, 1971. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Were the petitioner's rights pursuant to the Sixth Amendment to the Constitution of the United States violated by permitting numerous, former employees of the petitioner to give opinion testimony as to matters that were directly in issue where the proper foundation for such opinion testimony was not made and such testimony was based upon studies and projections made by such witnesses and which were neither offered nor admitted into evidence?

2. Did the trial judge invade the province of the jury by prejudicially commenting upon matters that were directly in issue in the trial of the case?

3. Where the mail fraud counts and securities violation counts of an indictment involved the same series of trans-

actions, were so closely interrelated and arose out of the same alleged scheme to defraud, did the Court of Appeals properly dismiss, on the basis of the concurrent sentence rule, petitioner's claim of prejudice resulting from the trial court erroneously instructing the jury that certain documents were securities as a matter of law?

4. Did the trial court's instruction that certain documents were securities within the meaning of the securities act invalidate petitioner's conviction on all counts of the indictment?

5. Was a proper foundation laid by the prosecution to permit the introduction into evidence of conversations between non-defendant salesmen and prospective investors which took place outside the presence of the petitioner?

6. Did the trial court properly instruct the jury pertaining to the admission into evidence of conversations that took place outside the presence of the petitioner?

STATUTES INVOLVED

Amendment VI. United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

The petitioner was indicted by himself in a 26 count indictment which charged him with various violations of Title 18, United States Code, Section 1341 and Title 15, United States Code, Section 77(q)(a). The first 21 counts of the indictment charged the petitioner with violations of the Mail Fraud statute while the remaining five counts charged him with violations of the Securities Act. Prior

to submitting the case to the jury, the trial judge dismissed Count XXV of the indictment because of insufficient evidence, and the petitioner was convicted by a jury on all of the remaining 25 counts.

Count I charged and set forth in great detail the scheme to defraud allegedly devised by the petitioner in the "offer and sale of securities" and charged him with a specific use of the mails for the purpose of executing the alleged scheme to defraud. Counts II through XXI realleged all of the allegations of Count I of the indictment pertaining to the scheme to defraud and then further charged the petitioner with a specific use of the mails for the purpose of executing the alleged scheme to defraud.

Counts XXII through XXVI realleged all of the allegations of Count I pertaining to the description of the scheme to defraud allegedly devised by the petitioner in the "offer and sale of securities" and then charged the petitioner with a specific mailing "in the offer and sale of securities in the manner and means more fully described in Count I" in violation of Title 15, United States Code, Section 77(q)(a). The mailings referred to Counts XXII through XXVI were those referred to in Counts I, III, IV, VI and XII, respectively.

In an attempt to prove the scheme to defraud alleged in the indictment the government called numerous witnesses who had purchased profit sharing area franchise agreements issued by Goal Systems from salesmen other than the petitioner. Conversations between these witnesses and the salesmen were admitted into evidence against the petitioner even though the conversations took place outside the presence of the petitioner (T.[1] 111, 141,

[1] "T" refers to Transcript of the trial court proceedings filed in the lower court.

187, 220, 266, 297, 327, 361, 394, 413 and 449). The government did not contend or attempt to prove that the persons making the statements were participants in the scheme described in the indictment.

During October, 1965, several employees of petitioner's company, including Robert E. Gill and Robert Nicolin, went to the United States Attorney's office in Minneapolis, Minnesota (T. 596). They continued working for petitioner while cooperating with the United States Attorney and even prepared some of the documents that were the subject of the instant indictment while employed in their dual capacities. Undoubtedly their reports and cooperation with the government while continuing in petitioner's employ led to the instant indictment.

Gill and Nicolin were permitted by the court to give opinion testimony as to the financial soundness and the feasibility of the Goal Systems operations (T. 555, 586, 667, 683, 697-699). In an attempt to establish the qualifications of Gill and his expertise in the affairs of Goal Systems permitting him to give opinion testimony, the government brought out such statements as:

> "Question (by the prosecutor): Now, what, if any . . . incentives were provided to the churches or consumers or merchants under this plan?
> "Answer (by Mr. Gill): Well, not having sold any this is a little fuzzy, but I believe it was 5 per cent back to the church. Now, I could be wrong on that" (T. 581)

Later in response to a question by the prosecutor, Mr. Gill replied, "Yes, but I didn't understand it. In other words, at that point I was lost" (T. 584). When asked by the prosecutor of his opinion of the so-called Church Plan, Mr. Gill stated, "I didn't understand a thing about it" (T. 588).

The government introduced into evidence a Desist and Refrain Order issued by the State of California against Goal Systems on July 23, 1965. Although the petitioner tendered an instruction which would have restricted the consideration of the order by the jury to the issue of intent, the trial court refused to so instruct, and instead the jury was permitted to consider this order on the basis of concealment of a material fact.

The petitioner testified in his own behalf and maintained that he at all times was acting in good faith and with advice of counsel. To rebut petitioner's good faith defense, the prosecution introduced a cease and desist order entered against him by the State of Arizona in 1961 in connection with his activities in promoting a health credit-card system in Arizona.

REASONS FOR GRANTING THE WRIT

1. The trial court permitted the province of the jury to be invaded and denied petitioner's right of confrontation of witnesses pursuant to the provisions of the Sixth Amendment to the Constitution of the United States by allowing non-expert, former employees of the petitioner to give opinion testimony relating to ultimate facts that were directly in issue. The qualifications of these witnesses to give opinion testimony were not established, and the documents upon which their opinions were predicated were neither offered nor admitted into evidence.

Despite the objections of the petitioner, two of the former employees of Goal Systems, Robert E. Gill and Robert D. Nicolin, were permitted to testify as government witnesses and give their opinions concerning their understanding of the operation of the business and whether or not they believed the business to be capable of being a financial success.

Mr. Gill was permitted to testify relative to his "understanding" of the provisions of the Agreement signed by various investors (T. 555-557). He was also permitted to testify pertaining to several projection sheets he prepared in the study of the business and to give an opinion as to the feasibility of the business based upon his study notwithstanding the fact that these documents were neither offered nor admitted into evidence by the Government. He stated that the feasibility of the Goal Systems plan was "nip and tuck" (T. 578 to 580), and that his conclusion of the Goal Systems stamp plan and the church plan "was a dead end." (T. 586)

It is especially interesting to note that the trial judge permitted this line of evidence even though Mr. Gill's testimony showed that he was not qualified to give such an opinion inasmuch as he stated that he did not understand a thing about the church plan (T. 588).

The other former employee, Robert D. Nicolin, was also permitted to testify, over objections, that in his opinion the effectiveness of the Goal Systems salesmen was diminished because they did not understand the complete program (T. 667), that the entire plan was doomed (T. 683), and that between September 14, 1965, and October, 1965, when he went to the United States Attorney's office he learned that in his opinion the plan was "fraudulent" (T. 697-699). Mr. Nicolin's lack of the requisite expertise needed to give opinion testimony was also manifest when he testified, "Well, I would say when I finished training them (the salesmen) they were perhaps as confused or maybe more confused about it than I was." (T. 676)

Permitting testimony of this nature from these witnesses was contrary to the general rule that under ordinary circumstances, a witness, in testifying, is restricted to facts within his personal knowledge, observation or recollection; and his opinion, conclusions, or inferences with respect to matters in issue or relevant to the issue may not be received in evidence. See 32 C.J.S. 50.

The obvious danger of permitting such testimony as this is that the jurors are likely to substitute the opinion of these witnesses for that of their own, and it also encroaches upon the province of the jury to determine for themselves the ultimate facts of the case.

The testimony of these witnesses was based upon accounting studies but yet the witnesses were not shown to have any special skill or knowledge in the field of accounting; and therefore, they did not possess any superior qualifications based on experience or otherwise as that of the members of the jury which would qualify them to give opinion testimony.

In *Lyles* v. *United States*, (D.C. Cir. 1957) 254 F.2d 725, 731, the court stated that a fact could be testified to by any witness, but, with a few exceptions, an opinion could be given in evidence only by an expert, and his qualifications as an expert and reason for the witness' opinion are part of the premise for allowing him to testify. As pointed out previously the government did not lay a proper foundation for permitting the witnesses, Gill and Nicolin, to qualify as experts to give opinion testimony.

In the written opinion handed down by the Eighth Circuit in the case at bar, the court did not see fit to comment upon this point of error urged by the petitioner. However, its decision is contrary and in conflict with other decisions of the Eighth Circuit as well as opinions of other United States Courts of Appeals.

In *Wesson* v. *United States*, (8th Cir. 1947) 164 F.2d 50, 54-55, the Eighth Circuit held that in a prosecution of a physician for illegal narcotic sales and illegal uses of narcotic order forms, permitting the opinion testimony of another physician that a physician in a small town could not administer the equivalent in narcotics of 35,000 ¼ grain tablets of morphine sulphate in 23 months in the course of a bona fide practice was prejudicial as an expression of opinion of guilt, where evidence had been admitted of the amount of narcotics purchased by physicians generally and also by a physician with a comparable practice in a comparable locality.

Permitting the witness Nicolin to testify that he had learned that petitioner's plan was "fraudulent" is in conflict with the decision in *Deaver* v. *United States*, (D.C. Cir. 1946) 155 F.2d 740, 743, which held that it was proper to refuse to permit a witness to testify on cross examination as to whether or not the witness considered any of

certain letters "fraudulent or a part of a scheme to defraud at the time" he received them.

In *Huff* v. *United States*, (5th Cir. 1959) 273 F.2d 56, 61, the Fifth Circuit held that in a prosecution for smuggling certain jewelry into the United States, the action of the court in permitting a government witness to testify that it was his opinion, that the jewelry found in the possession of the defendant was of a commercial nature, rather than personal effects, exempted from duty, was prejudicial error, in view of the fact that the government was not authorized in such a manner to substitute its witness for the court in charging the jury as to applicable law, nor was the witness' opinion and conclusions admissible as to one of the ultimate facts to be decided by the jury.

In another Fifth Circuit Case, *Mack* v. *United States*, (5th Cir. 1959) 268 F.2d 931-933, the court reversed the convictions of defendants for falsely certifying statements filed with the Veteran's Administration and held that permitting witnesses to testify to questions calling for a conclusion as to whether, based upon their knowledge of facts not before the jury, the statements filed with the Veteran's Administration were true or false, rather than proving by competent testimony the standards and regulations alleged to have been violated, was improper; and the testimony so elicited was inadmissible and its admission intrinsically prejudicial. As pointed out previously the witnesses in the case at bar were permitted to testify pertaining to their conclusions as to the financial feasibility of petitioner's business based upon projections prepared by them and which projections were neither offered nor admitted into evidence.

In *United States* v. *Williams*, (5th Cir. 1970) 424 F.2d 244, the Fifth Circuit held that permitting a witness to

give his opinion based upon records that were not admitted into evidence was a denial of the defendant's right of confrontation of witnesses pursuant to the provisions of the Sixth Amendment to the Constitution of the United States.

As this Court stated in *Pointer* v. *Texas*, (1965) 380 U.S. 400, 405, 85 S.Ct. 1065, 1068:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Inasmuch as the objected to testimony of the witnesses, Gill and Nicolin, concerned factual matters which should have been ultimately decided by the jury, the admission of their conclusions and opinions into evidence by the trial judge was of such a prejudicial nature as to effectively deprive the petitioner of that type of fair trial guaranteed to him by the Constitution so as to require reversal of his conviction.

2. The trial judge invaded the province of the jury by prejudicially commenting upon matters that were directly in issue in the trial of this cause.

During the course of the trial the trial judge made several comments in the presence of the jury which had the effect of conveying to the members of the jury the judge's belief in the guilt of the petitioner and the fact that the government had proved the scheme to defraud as alleged in the indictment.

During the redirect examination of a government witness, the prosecutor asked the following question (T. 545):

> "It would also appear from that letter that he's [the defendant] amended your contract without your permission, is that not correct, Mr. Adolphson, and that he's apparently agreed that if any paid sales are made in Martin County he's going to distribute them to all franchise holders wherever they may be?"

Defense counsel objected to the question as a misstatement of what had been said, and stated:

> "There is no change of his contract. He has gone beyond what he has said he would do. He is going to give him more."

The trial judge then responded:

> "I think it is a fair question, Mr. Brophey. The indication is that the defendant is intending to break all of his contracts." (T. 546)

Later during the trial counsel for the petitioner objected to a question asked of a government witness on the grounds that it called for a hearsay answer. Thereupon the following colloquy took place in the presence of the jury:

> "The Court: Mr. Cudd, I assume the testimony is hearsay, isn't it?
> "Mr. Cudd: [the prosecutor]: Well, it is, Your Honor, but it is the government's position that we have established the scheme and, therefore, since Mr. Adolphson is an agent of the company, that the statement of his agent in furtherance of the company's business is now admissible." (T. Vol. V 21)

The trial judge then ruled that the answer given by the witness could stand.

The ruling of the court below to the effect that this activity of the trial judge was not prejudicial error is in conflict with this court's previous rulings in *Quercia* v.

United States, 289 U.S. 466, 53 S.Ct. 698 and *Bollenbach* v. *United States*, 326 U.S. 607.

In *Quercia* this court ruled that although a trial judge is permitted the privilege of commenting on the evidence, this privilege does have its inherent limitations. In commenting upon the evidence the trial judge is duty bound to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially it should not be considered so that deductions and theories not warranted by the evidence will be avoided.

The petitioner in the case at bar was being tried for mail fraud and among the misrepresentations attempted to be shown by the prosecution was the fact that the petitioner was not intending to abide by the representations made in the contracts executed by Goal Systems and the investors. The comment of the trial judge to the effect that the petitioner was intending to break all of his contracts had the effect of conveying to the jury the judge's view that the petitioner was guilty of the offense for the reason that he never intended to honor the terms and provisions of the agreements signed by the investors. In essence the trial judge was effectively depriving the petitioner of his constitutional right to a trial by the jury.

It cannot be said that this comment could not prejudice the jury for we are all aware of the fact that the influence of the trial judge on the jury "is necessarily and properly of great weight and his lightest word or intimation is received with deference and may prove controlling." *Quercia* v. *United States*, supra, page 470. By commenting on such a crucial point as this, the trial judge was effectively destroying the petitioner's good faith defense of his intention to abide by all of the agreements and to make Goal Systems a workable and profitable business.

By stating that the petitioner never intended to abide by the contracts, the trial judge was exhibiting a prosecutor's zeal inconsistent with that detachment and aloofness the courts have again and again demanded, particularly in criminal trials. *See United States* v. *Porter*, 336 F.2d 270, 275 (6th Cir. 1967).

By agreeing with the prosecutor after he stated in the presence of the jury that the government had proved the scheme to defraud alleged in the indictment, the trial judge was in effect directing a verdict of guilty. The courts have consistently held that the trial judge cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. *Dillon* v. *United States*, 279 F. 639 (2nd Cir.). In instances such as this where the trial judge urges his own view of the guilt or innocence of the accused, the courts have held that the defendant is prejudiced notwithstanding the fact that there is strong evidence presented against him. *Jackson* v. *United States*, 329 F.2d 893 (D.C. Cir. 1964).

The error of the trial judge was further compounded by the fact that at the time of making these comments he did not advise the jury that they were not bound by his comments or interpretation of the evidence.

In *Bollenbach* v. *United States*, (1946) 326 U.S. 607, 612-615, this Court stated:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."
>
> • • •
>
> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to

> the procedure and standards appropriate for criminal trials in the federal courts."
>
> • • •
>
> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded . . . . All law is technical if viewed solely from reasons for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency . . . . . Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless . . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of the accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance however cumbersome that process may be."

In reaching the conclusion that the trial judge did not overstep the bounds of propriety, the Eighth Circuit relies upon the case of *Ray* v. *United States*, 367 F.2d 260, 263 (8th Cir. 1966). However, in that case the Court of Appeals specifically stated that "[I]t is significant the trial court did not, during the presentation of the testimony or during his charge to the jury, express any opinion as to the facts or comment directly upon the witnesses and their testimony." *Ray* v. *United States*, supra, at page 263. The

whole crux of the government's case was that the petitioner was not intending to abide by his contracts. Undoubtedly the unwarranted remarks of the trial judge in commenting upon the petitioner's intent was instrumental in guiding the jury to return a guilty verdict.

Reliance by the court below on the case of *United States* v. *Allegretti*, 340 F.2d 254 (7th Cir. 1964) (en banc), *reversing in part*, *United States* v. *Allegretti*, 340 F.2d 243 (7th Cir.), *cert. denied*, 381 U.S. 911 (1965), is also misplaced. In *Allegretti* the court stated:

> "It must be remembered that this jury, during days of trial proceedings, had heard the United States Attorney promise upon many, many occasions that the government would 'connect up' testimony then being offered in evidence. In the light of that fact, it seems clear to me that that same jury, hearing the court's reference to 'connected up' and 'connection' in context, would understand that the comments related only to the question of the admissibility of the evidence, not to an ultimate issue of the case." 340 F.2d at page 249.

The complained of colloquy between the prosecutor and the court in the case at bar is totally different from the circumstances of the *Allegretti* case because in the instant case the prosecutor, in the presence of the jury, stated in effect that *these conversations should be admitted because the government had in fact proved the scheme to defraud alleged in the indictment, the ultimate issue of the case which should properly have been determined by the jury.* The trial judge then admitted such conversations into evidence, and the jury could then only have understood that the reason for this admission was the fact that the scheme to defraud had been established by the government.

See *United States* v. *Pronger*, 287 F.2d 498 (7th Cir. 1961), wherein the Seventh Circuit stated:

"Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury." 287 F.2d at page 500.

3. Where the mail fraud counts and securities violation counts of an indictment involved the same series of transactions, were so closely interrelated and arose out of the same alleged scheme to defraud, the Court of Appeals did not properly dismiss, on the basis of the concurrent sentence rule, petitioner's claim of prejudice resulting from the trial court's erroneously instructing the jury that certain documents were securities as a matter of law. The trial court's instruction that certain documents were securities within the meaning of the security act invalidated petitioner's conviction on all counts of the indictment.

Counts 22 through 26 of the indictment charged the petitioner with violations of the Federal Securities Statute, Title 15, United States Code, Section 77(q)(a), involving the sale of the franchise agreements. Count 25 of the indictment was dismissed by the trial judge prior to sending the case to the jury. When instructing the jury the trial judge stated (T. Vol. VIII 78):

"The terms security as used in Title 15, United States Code, Sec. 77 (q)(a), and defined in Title 15, United States Code, Sec. 77 (b)(1), includes any certificate of interest or participation in any profit-sharing agreement, any investment contract, or, in general, any interest or instrument commonly known as a security. I instruct you that Goal Systems profit-sharing assigned area agreements and profit-sharing area franchise agreements are securities under this statute."

Although the Court of Appeals concluded that such an instruction was erroneous, the Court of Appeals cursorily reasoned that in view of the concurrent sentence rule there was no prejudice resulting to the petitioner from the giving of this erroneous instruction. However, it is impossible to summarily dismiss petitioner's claim of prejudice without fully analyzing the charges brought against the petitioner. The doctrine of the one good count is not a fetish, and an inquiry must be made whether the matter of the error committed below or other circumstances suggest that the petitioner might have received a longer sentence than otherwise would have been imposed, or that he was prejudiced by the results of the proceedings below. *United States* v. *Hines*, (2nd Cir. 1958) 256 F.2d 561, 563.

Even though the other 21 counts of the indictment charged the petitioner with violations of the Mail Fraud Statute, Title 18, United States Code, Section 1341, since both criminal violations arose out of the same series of transactions, it is impossible to segregate the securities violation counts (Counts 22 through 26) from the other counts of the indictment and conclude that no prejudice could have resulted to petitioner as a result of this erroneous instruction.

The scheme to defraud as charged in the indictment centered around the offering and selling of securities, and each and every count of the 26 count indictment referred to that fact. In that portion of the indictment which describes the scheme to defraud, the drafter of the indictment used the phrase "securities" no less than six times. The scheme to defraud is repeated and realleged in each and every count of the indictment including both the mail fraud violations as well as the securities violations. Had not the trial judge invaded the province of the jury by instructing

them that the Goal Systems Agreements were securities as a matter of law, it is very likely that the jury might have reached a different verdict not only with respect to the securities counts (Counts 22, 23, 24 and 26) but also as to the remaining mail fraud counts (Counts 1 through 21). However, whether or not a different verdict would have resulted had the jury been properly instructed is not the criteria in determining whether or not the petitioner was prejudiced.

As this Court stated in *Kotteakos* v. *United States*, (1946) 328 U.S. 750, 66 S.Ct. 1239:

> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden if it had been presented in separate trials for each offense . . . but whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might possibly, have resulted in a properly conducted trial is not the criterion . . ." 328 U.S. at page 776

See also *United States* v. *Griffin*, (6th Cir. 1967) 382 F.2d 823, wherein it was stated:

> "Conviction might possibly have resulted even if the cautionary instruction had been given, but this is not the criterion. *Kotteakos* v. *United States*, supra 328 U.S. at 776 (Head Note 11 . . .)
> ". . . 'had the jury convicted on proper instructions it would be the end of the matter . . .,' *Morrisette* v. *United States*, supra 342 U.S. at 276, but the only way now to eradicate the omission and accord Griffin his rights is to grant a new trial." 382 F.2d at page 829.

As a result of the similarity of the charges it cannot be said as a matter of fact that the jury was not influenced by the "spill over" of the evidence introduced in support of

the allegations of the securities violation counts in determining the guilt or innocence of the petitioner as to the mail fraud counts. This is especially true pertaining to the State of Arizona cease and desist order which referred to the petitioner having previously violated certain State of Arizona statutes relating to securities. The trial court permitted the Government to introduce this order on the theory that it tended to show petitioner's intent to defraud in violating the federal securities laws, yet undoubtedly it was also considered by the jury relative to the petitioner's intent to defraud in the mail fraud counts because of the constant reference to securities in those counts.

The ruling of the court below is in conflict with an earlier Eighth Circuit case. In that case, *DeHugh v. United States*, (8th Cir. 1968) 401 F.2d 346, the court stated:

> "We are not clairvoyant and cannot possibly ascertain the effect which the evidence produced in connection with the invalid counts of the indictment had on the jury's verdict, and certainly we cannot say with any fair assurance that the defendant's substantial rights were not affected, and, therefore, it is only proper that we remand for a new trial." 401 F.2d at page 352.

The Seventh Circuit also recently reversed the conviction of a defendant who was given concurrent sentences on three counts of an indictment where it was held that the evidence under two of the counts was inadmissible. See *United States v. Stevenson*, (7th Cir. 1969) 409 F.2d 354, wherein it was stated:

> "Normally where sentences are concurrent on several counts we sustain a conviction if valid on any of the counts. Here however we think it is highly probable that Stevenson was prejudiced under counts I and II by the introduction of the evidence to prove count III. We think, in fairness, the three convictions should be set aside." 409 F.2d at page 357.

In the case of *United States* v. *Borash*, 365 F.2d 395 (2nd Cir. 1966), the defendant was tried and convicted in a multiple count indictment of the charges of bribing internal revenue agents and charges of aiding and abetting. The Second Circuit determined that the convictions on the bribery counts were defective, and also reversed the convictions on the aiding and abetting counts, stating:

> "We are far from being certain that the restriction and deprecation of the impeachment of Clyne, the chief Government witness, and the admission of the Lupescu hearsay statement in the testimony of Coady, the undercover agent, did not have a spill-over effect on the De Sibio counts; that the jury might not have exercised its prerogative of leniency if these charges alone had been before it; or that the judge would have given the same sentence for convictions on these two aiding and abetting counts as he did for those on the twenty-six, including convictions for bribery. Applying the rule of *United States* v. *Hines*, supra, 256 F.2d 561, we think our duty to 'require such further proceedings to be had as may be just under the circumstances,' 28 U.S.C. § 2106, demands a reversal and a remand for a new trial." 365 F.2d at page 403.

Therefore, in the case at bar, since the charges pertaining to the mail fraud violations and the securities violations were clearly inseparable from one another because they involved the same period of time, same transactions, same witnesses, and each of the counts of the indictment contained the same allegations of the scheme to defraud, including repeated references to the "offer and sale of securities", it is highly probable that the erroneous instruction pertaining to the definition of securities and other evidence introduced in support of the securities violation counts could have been mistakenly considered by the jury as tending to establish the guilt of the petitioner as to the

mail fraud counts. Under such circumstances the petitioner was clearly prejudiced and should be granted a new trial free from such defects.

4. The petitioner was prejudiced by the admission into evidence of conversations between non-defendant salesmen and prospective investors which took place outside the presence of the petitioner. The trial court did not properly instruct the jury on the circumstances to be considered before they could consider the statements made outside the petitioner's presence.

During the course of the trial, despite the objections of the petitioner, conversations between various non-defendant salesmen and prospective investors of Goal Systems which took place outside of the presence of the petitioner were admitted into evidence. Similarly, conversations between various employees of Goal Systems which took place outside the presence of the petitioner were also admitted into evidence despite petitioner's objections on the ground of hearsay. These conversations were admitted into evidence after the prosecution assured the trial judge that they would be connected. (T. 111, 187, 220, 266, 297, 327, 361, 394, 413, 449, 550, Vol. V 20, Vol. V 30.)

It is petitioner's contention that the admission of such testimony was error and contrary to earlier Eighth Circuit decisions to the effect that an accused could not be held criminally responsible for every statement or promise made by a salesman who drew upon his imagination, instead of his authority, to close a contract; and that the accused could be held liable for statements made outside his presence only if the evidence showed his knowledge, authorization or ratification of such statements. See *Beck* v. *United States*, 33 F.2d 107, 112 (8th Cir. 1929), and *Barrett* v. *United States*, 33 F.2d 115, 116 (8th Cir. 1929).

It is petitioner's further contention that the trial court failed to properly instruct the jury concerning whether or not the statements made by the salesmen outside the presence of the petitioner could properly be used in determining the guilt or innocence of the petitioner. The instruction given by the court was as follows (T. Vol. VIII 83):

> "In this case, the Government has presented evidence as to statements made in the absence of the defendant. Before you may consider such evidence you must first find that the Government has by evidence apart from such statements established beyond a reasonable doubt
>
> (1) that the defendant had knowingly and intentionally devised the scheme described in the indictment; and
>
> (2) that the statement or statements were made pursuant to such scheme and in furtherance thereof.
>
> "If the Government has so established both one and two, which I just read to you, you may consider such evidence on passing upon the guilt of the defendant and give it such weight as you feel it justly entitled to.
>
> "If the Government has not established both one and two, then you should reject such evidence and give it no consideration upon passing upon the guilt of the defendant."

This instruction is defective for the reason that it failed to advise the jury that these statements would be admissible against the petitioner only if they also found from all of the evidence and circumstances that the petitioner had knowledge of the statements, authorized the statements or ratified them. Pursuant to the instruction actually given by the trial judge, however, the jury was permitted to consider the statements made outside the

presence of the petitioner even though petitioner had no knowledge of, never ratified or authorized the statements.

The determination of whether or not the petitioner had knowledge of, authorized or ratified the statements made outside his presence should not be left with the trial judge but should have been a matter for consideration by the jury. By the trial court removing this matter from the jury, he was invading the province of the jury on a vital and important issue in the case and was denying the petitioner the type of trial guaranteed him by the Sixth Amendment to the Constitution.

In *Pritchard v. United States*, 386 F.2d 760, 767 (8th Cir. 1967), it was held:

> "We recognize that caution must be exercised by the trial court in the reception in evidence of statements of salesmen not made in the presence of the defendants and that proof of employment of the salesmen standing alone is an insufficient factor for admitting representations made by the salesmen to the victim. *There must be some evidence to support a finding of authorization or ratification by the defendants of the statements by the salesmen and whether there be such authorization or ratification will usually present a fact issue to be decided on a case-to-case basis.*" (Emphasis Added)

In *Beck v. United States*, 305 F.2d 137 (10th Cir. 1962), the Tenth Circuit held:

> "It is agreed the general rule permits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered. . . . We are cognizant of the difficulties encountered by the Government in a fraud case, but safeguards for the defendant from the dangers of hearsay evidence cannot

be disregarded. *See Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790. The authority to render such statements admissible may be found in the circumstances of the particular case, in the scope of the plan or scheme or from other pertinent facts. *A proper foundation must always be laid.*" (Emphasis Added)

One of the cases relied upon by the court below in reaching its decision was *Reistroffer v. United States*, 258 F.2d 379 (8th Cir. 1958). However, the court's instruction in that case was more detailed and the pertinent portion was as follows:

> "In the present case the Government has presented evidence as to statements made in the absence of the different defendants. Before you may consider such evidence as to any defendant, you must first find that the Government has by evidence apart from such statements established beyond a reasonable doubt (1) *that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described in the indictment, . . .*" (Emphasis Added) 258 F.2d at page 387, footnote 3.

In the case at bar since there was no contention by the government that the persons making the statements outside the presence of the petitioner were participants in the scheme alleged in the instant indictment, it became incumbent upon the trial judge to qualify the given instruction to include a finding by the jury that such statements were made with the knowledge of the petitioner and that he authorized or ratified such statements.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 19,779

United States of America,
Appellee,
v.
Henry Beausoen,
Appellant.

Appeal from the United States District Court for the District of Minnesota.

[October 29, 1970.]

Before MATTHES Chief Judge, HEANEY and BRIGHT, Circuit Judges.

HEANEY, *Circuit Judge.*

The defendant, Henry Beausoen, was tried and convicted of twenty-one counts of using the mails in connection with a scheme or artifice to defraud (18 U.S.C.A. §1341) and four counts of using the mails to sell securities in a scheme or artifice to defraud (15 U.S.C.A. §77 (q)(a)). The defendant was sentenced to concurrent five-year terms on each count. We affirm.

The defendant's convictions relate to his activities as promoter of a trading stamp program known as Goal Systems. Goal Systems was promoted through the sale of franchise agreements which promised the investor a return on all stamps sold in his franchise area. Goal Systems agreed to develop each franchise area by convincing the local merchants to use the Goal Systems' trading stamps. It committed itself to using the proceeds

from the sales of franchise agreements for promotional purposes. The defendant was active in Goal Systems from June 13, 1963, through the time of trial in March, 1969. Goal Systems operated primarily in California and in Minnesota. Goal Systems was a failure. Of the approximately $253,000 paid by investors for franchises, only a minute portion was ever returned.

The defendant conceded at trial that he sold the franchises specified in the indictment, but contended that he promoted the sales in good faith and without intent to defraud the public. On appeal, the defendant concedes that there was sufficient evidence, if believed, to support the jury's guilty verdict. He argues, however, that the evidence was close and that the trial court committed a number of trial errors which individually or cumulatively prevented him from obtaining a fair trial.

At the outset, we note a disagreement with the defendant's characterization of the evidence as being only marginally sufficient to sustain the verdict. We have carefully reviewed the evidence and find that there was very substantial evidence, apart from that to which the defendant objected, demonstrating the defendant's guilt. The evidence indicated that the following representations were made and that such representations were false:

(1) That the money invested would be used solely to promote Goal Systems nationally and in the particular profit sharing area.

(2) That the franchised areas would begin to be developed within 30 to 180 days.

(3) That an investment in a franchise area would produce immediate earnings.

(4) That a number of nationally known chain stores were or would be participating in the program.

In addition, the evidence indicated that several material facts were not disclosed to investors:

(1) Substantial numbers of stamp pads were issued without consideration and without provision for redemption.

(2) Payments to investors were made out of capital rather than out of earnings.

In light of the evidence, we fail to see how minor trial errors, if any, were prejudicial. We nonetheless consider the defendant's major contentions.

I

The government introduced into evidence a July 23, 1965, California Cease and Desist Order directing the defendant to refrain from engaging in the trading stamp business and from promoting Coral Systems franchise agreements until California Corporation and Securities Laws had been complied with. The government proved that the order had been served upon the defendant, that it had been violated and that the defendant had not disclosed the existence of the order to investors while promoting Coral Systems.

The defendant alleges that the trial court erred when it failed to give the following jury instruction:

> "If Mr. Bessesen in any manner acted contrary to the California Cease and Desist Order, it is in no way material in this case except as it may tend to bear on the issue of intent to defraud. Defendant is not here charged with any violation of the California Cease and Desist Order."

In our view, the trial judge properly refused to give such an instruction. The government charged that the defendant had misled investors by making false representations and by concealing material facts. Among the facts alleged to have been concealed was the existence of the California Cease and Desist Order. The government proved that the defendant had continued to sell franchise agreements in California after the issuance of the Cease

and Desist Order without disclosing its existence to the investors. Under the circumstances, we think the jury was properly allowed to consider whether the defendant's failure to advise the California investors of the Order was the misleading concealment of a material fact. Thus, the requested instruction would have improperly restricted the purposes for which the jury could consider the defendant's actions relative to the California Cease and Desist Order. *Nemec v. United States*, 178 F.2d 656 (9th Cir. 1949), *cert. denied*, 339 U.S. 985 (1950).

II

The government's first witness was Harvey Scheinkman. In substance, Scheinkman testified that he had first met the defendant in April of 1964 in regard to a separate credit promotion involving the defendant; that in June of 1964, he again met with the defendant, at which time the defendant explained a new program—Goal Systems—to him; that he thereafter invested $1,000 in Goal with the understanding that forty percent of that amount was to be used for local advertising and sixty percent for national advertising and that he was to receive twenty cents per stamp pad sold as a return on his investment; that he received no return of any kind; and that after he invested in Goal Systems, the defendant urged him to ignore his earlier investment in the credit plan and concentrate on Goal Systems.

The defendant contends that this evidence was erroneously admitted because there was no connection between the testimony of Scheinkman and the allegations and charges in the indictment.

We disagree. Most of the testimony concerning Goal Systems was directly related to the allegations in the indictment that the defendant had organized and promoted Goal Systems. The remaining testimony which related to the credit plan and to the failure of Goal Systems was admissible under the rule that where intent and knowledge are essential elements of an offense, evidence of other acts

similar in nature and closely related in time to those encompassed in the charge is admissible to establish intent and guilty knowledge. *Von Feldt v. United States*, 407 F.2d 95 (8th Cir. 1969). See also, *United States v. Deaton*, 381 F.2d 114 (2nd Cir. 1967); *Koolish v. United States*, 340 F.2d 513 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965).

III

The defendant contends that the trial judge made two improper and prejudicial statements in the presence of the jury. The first statement objected to occurred during the redirect examination of a prosecution witness. On cross-examination, the defense had attempted to establish the position that the defendant's actions represented a good faith effort to repay the witness in spite of financial adversity. It had done so by referring to a Goal Systems Newsletter sent out by the defendant which contained the following:

> "Question: If the Area covered by my Franchise doesn't produce enough paid sales to make my franchise worthwile, now or in the future, what then?
> "Answer: First, from *all* business being done, we intend to repay your deposit monies, within the two-year term of your Franchise. Then when your paid deposit monies have been paid to you, we will submit a revised Agreement to you wherein you will receive a franchise commission of 25¢ per paid sold anywhere, proportionate to your deposit." (Emphasis included.)

On redirect examination, the prosecutor responded to that line of questioning with the following question:

> "It would also appear from that letter that [the defendant] amended your contract without your permission, is that not correct, Mr. Adolphson, and that he's apparently agreed that if any paid sales are made in Martin County he's going to distribute them to all franchise holders wherever they may be?"

Defense counsel objected to the question as a misstatement of what had been said, stating:

"There is no change of his contract. He has gone beyond what he has said he would do. He is going to give him more."

The trial judge then responded:

"I think it is a fair question, Mr. Brophey. The indication is that the defendant is intending to break all of his contracts."

In our view, the court's comment was not prejudicial error. The question was a fair one and the judge was correct in his ruling on the objection. The remainder of the comment may not have been necessary, but a federal judge has the power to comment on the evidence so long as he does not become an advocate for one side. *Kramer* v. *United States*, 408 F.2d 837 (8th Cir. 1969). See also, *Leffler* v. *United States*, 400 F.2d 44 (8th Cir. 1968). Here, the comment on the evidence, especially when considered in the context of a trial which lasted nine days, cannot be considered unfair advocacy.

The line of questioning being pursued was rather complicated, the defense counsel's objection tended to confuse the issue and the judge's comment was a clarification of his understanding of the testimony. We do not think he overstepped the bounds of propriety. *Ray* v. *United States*, 367 F.2d 258 (8th Cir.), *cert. denied*, 386 U.S. 913 (1966). Furthermore, since the defendant did not object or move for a corrective instruction, any alleged error was not properly preserved for appellate review. *Petschl* v. *United States*, 369 F.2d 769 (8th Cir. 1966).

The second comment objected to by the defendant occurred during direct examination of another government witness. After the defense objected to a question as calling for hearsay, the following exchange took place:

"THE COURT: Mr. Cudd, I assume the testimony is hearsay, isn't it?

"MR. CUDD [the prosecutor]: Well, it is, Your Honor, but it is the government's position that we

> have established the scheme and, therefore, since Mr. Adolphson is an agent of the company, that the statement of his agent in furtherance of the company's business is now admissible."

The trial judge then overruled the objection.

The defendant argues that this exchange improperly denoted the court's agreement with the prosecutor and directed the jury on a basic fact issue in the case.

First, we note that the defendant did not object nor request a corrective instruction when the exchange occurred. More importantly, we do not think the trial judge committed error. The defendant had objected, the testimony called for was clearly hearsay and the trial court needed to know whether it was admissible under some exception to the hearsay rule. When the reason was provided, the judge merely overruled the objection without comment. Furthermore, at the close of the case, the judge carefully instructed the jury that they could consider statements made by various persons in the absence of the defendant only if *they first found* beyond a reasonable doubt:

(1) that the defendant had knowingly and intentionally devised the scheme described in the indictment; and

(2) that the statement or statements were made pursuant to such a scheme and in furtherance thereof.[1]

While the trial court should be careful not to influence the jury, it is clear that under all the circumstances of this case the trial court acted properly. See, *United States* v. *Allegretti*, 340 F.2d 254 (7th Cir. 1964) (en banc),

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[1] We think that under *Reistoffer* v. *United States*, 258 F.2d 379 (8th Cir. 1958), *cert. denied*, 358 U.S. 927 (1959), and *Pritchard* v. *United States*, 386 F.2d 760 (8th Cir. 1967), *cert. denied*, 390 U.S. 1004 (1968), this was a proper jury instruction. See also, *Schaefer* v. *United States*, 265 F.2d 750 (8th Cir.), *cert. denied*, 361 U.S. 844 (1959).

reversing in part, United States v. *Allegretti*, 340 F.2d 243 (7th Cir.), *cert. denied*, 381 U.S. 911 (1965).

IV

On cross-examination, the government questioned the defendant regarding the promotion of a health credit card system in Arizona. The defendant admitted that he had promoted such a plan in 1961 and that the State of Arizona had issued a cease and desist order against him in connection with those activities. The government then introduced a copy of the order.

On appeal, the defendant contends that the trial court committed prejudicial error in admitting into evidence that part of the order which recited:

> "Whereas, it appears to this Commission that the above persons have engaged in, are engaging in, or are about to engage in acts, practices and transaction which constitute violations of the [Arizona securities laws] * * *."

We do not agree that the admission of this recital was prejudicial error. The government's line of questioning was an attempt to show the defendant's intent to defraud. The defendant claimed that he acted in good faith at all times. The government had shown that the defendant had violated a California Cease and Desist Order in connection with the promotion of Ideal Systems. These violations of the California Order were far more suspect when the government showed that the defendant had engaged in similar activities and had received a cease and desist order in Arizona in the recent past.

The Arizona Cease and Desist Order was generally admissible as an official record. 28 U.S.C.A. §1732; *LaPorte* v. *United States*, 300 F.2d 878 (9th Cir. 1962). In light of the defendant's admission that he had participated in the promotion of the health credit card plan and the proper admission into evidence of the order requiring the defendant to cease activities in the State of Arizona until

the securities' laws had been complied with, we think that the government's purpose was completed and the portion of the order objected to was not prejudicial.

V

The defendant was convicted on four counts of violating security statutes in the sale of the franchise agreements. The defendant urges that the trial judge erroneously invaded the province of the jury by instructing the jury that the franchise agreement was a security.

While this contention is not without merit,[1] we do not think it can help the defendant. The court imposed a general five-year sentence on each of the twenty-five counts of the indictment upon which the defendant was found guilty. Only four of these counts involved violations of the securities' statute. Under the concurrent sentence rule, a proper conviction on at least one count will support the judgment. *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Tarvestad* v. *United States*, 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, . . . U.S. . . . (1970). The concurrent sentence rule is applicable here for we can perceive no prejudice in the alleged error, *Benton* v. *Maryland*, 395 U.S. 784 (1969), and "the danger that adverse, collateral legal consequences might flow from a failure to rule on this allegation is remote," *Kauffmann* v. *United States*, 414 F.2d 1022 (8th Cir. 1969), *cert. denied*, ... U.S. ..... (1970).

We have carefully reviewed the record and the defendant's remaining contentions. We conclude that the defendant received a trial free of prejudicial error. The conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[1] See, *e.g.*, *United States* v. *England*, 347 F.2d 425 (7th Cir. 1965).

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 19779 September Term, 1970

United States of America,
Appellee,
v.
Henry Bessesen,
Appellant.

Appeal from the United States District Court for the District of Minnesota.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by the Court that the same be, and it is hereby, denied.

December 14, 1970

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

HENRY BESSESEN,
Petitioner,
vs.
UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 4, 1971.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 7th
day of January, 1971.